UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-5024

United States of America, Appellee,

v.

Thomas E. Fortner Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Charles H. Haden, II, District Judge.

Argued August 31, 1982

Decided September 21, 1982

Before BUTZNER, Circuit Judge, FIELD, Senior Circuit Judge, and MURNAGHAN, Circuit Judge.

John R. Mitchell for Appellants; Nancy C. Loar, Assistant United States Attorney (David A. Faber, United States Attorney, Ruth Lynette Ranson, Assistant United States Attorney on brief) for Appellee.

APPENDIX "A"

PER CURIAM:

Dr. Thomas E. Fortner appeals from his conviction of mail fraud, bribery, and conspiracy to commit mail fraud and bribery.[1]

During 1977 and 1978 Fortner, a physician licensed to practice medicine in West Virginia operated with his wife's assistance a private medical practice in Logan, West Virginia. He treated patients who were entitled to medical benefits under the United Mine Workers of America Health and Retirement Funds health benefits program. According to the evidence adduced at trial, the Fortners systematically submitted to the Funds fraudulent bills for medical services that had never been rendered. Although the exact amount of the fraud was never determined, a substantial portion of the $327,364.00 paid by the Funds to Fortner from

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1 Fortner's wife, Rebecca, also appealed. However, prior to oral argument she dismissed her appeal.

May, 1977 through August, 1978 was for fraudulent claims. In addition, Fortner paid fees and kickbacks in excess of $25,000 to employees of the Funds in order to conceal the illegal activity.

The Fortners and Andrew Martins, Jr., an employee of the Funds, were charged in a fifteen count indictment on July 29, 1980.[2] Pursuant to a plea agreement, Martin entered a guilty plea to Count One. At trial, Fortner Attempted to establish his insanity, and Rebecca Fortner sought to show that she had been under duress during the pertinent time period. The jury found Fortner guilty on fourteen counts, and Rebecca Fortner guilty

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2 Count One of the indictment charged all three with conspiracy to commit bribery and mail fraud. 18 U.S.C. §371. Counts Two through Four charged the Fortners with mail fraud. 18 U.S.C. §1341. The remaining counts charged Fortner, individually, with bribery. 18 U.S.C. §1954.

on one count.[3] Fortner now argues on appeal that the district court erred in refusing to grant a motion for judgment of acquittal, and that it was improper for government counsel to make reference to Martins' guilty plea.

I.

Fortner moved for a judgment of acquittal at the conclusion of the government's case-in chief, at the close of the defendants' case, and again after the government's rebuttal. The district court denied all motions. He claims that the evidence on the issue of his sanity was so clear that no jury could reasonably find him sane during the pertinent time period.

A motion for a judgment of acquittal

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3 The jury was unable to reach a verdict on Counts One, Three and Four as to Rebecca Fortner, and Count Fourteen as to Dr. Fortner.

must be denied if "the evidence and inferences therefrom would warrant the jury's finding the defendant guilty beyond a reasonable doubt." United States v. Dominguez, 604 F.2d 304, 310 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980), quoting Burks v. United States, 437 U.S. 1, 16 (1978). The Fourth Circuit has adopted the American Law Institute formulation of the insanity defense, which provides:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

United States v. Chandler, 393 F.2d 920, 926 (4th Cir. 1968) (en banc). Thus the inquiry to be made is whether the evidence, viewed in the light most favorable to the government, would allow a jury to find that Fortner had substantial capacity at the time of the offenses to appreciate the criminality of

his conduct or to conform his conduct to the requirement of law. Jackson v. Virginia, 443 U.S. 307, 319 (1979); Glasser v. United States, 315 U.S. 60, 80 (1942).

Five psychiatrists testified, three for the defense and two for the government. The defense psychiatrists all testified that Fortner was insane during 1977 and 1978,[4] but the government experts reached a different conclusion. Dr. David Walker, who had attended medical school with Fortner and had treated him as an out-patient in 1979, testified that from the spring of 1977 to December, 1978, Fortner had substantial capacity to conform his conduct to the requirements of law, and appreciated the wrongfulness of his conduct. Dr. Charles Weise, the

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4 However, the testimony of Dr. Glen Weaver, one of the defense psychiatrists, was sufficiently incredible that it created some doubt as to all of the evidence

other government psychiatrist, testified that Fortner was legally sane for periods during that time. In addition, patients who frequently saw Fortner testified that he appeared coherent and well able to carry on his medical practice.

It is the jury's role to weigh the evidence and decide questions of credibility. United States v. Tresvant, 677 F.2d 1018, 1021 (4th Cir. 1982); United States v. Fisher, 484 F.2d 868, 869-70 (4th Cir. 1973), cert. denied, 415 U.S. 924 (1974). Here, there was contradictory testimony with respect to Fortner's sanity. The jury was entitled to reject the testimony of the defense psychiatrists and conclude that Fortner was sane.

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4 of insanity. Dr. Weaver testified that Dr. Fortner was insane during the entire period from 1966 through 1978. During that time, however, he successfully completed medical school and his internship and residency, and began his private practice, apparently without violating the law until 1977.

Since there is ample evidence to support that finding, the district court did not err in refusing to enter a judgment of acquittal.

II.

On direct examination of Andrew Martin, Jr., an indicted co-conspirator, the prosecution asked about Martin's guilty plea. Martin testified that he had pleaded guilty to conspiracy to commit mail fraud, and that he had been sentenced before his testimony. Fortner argues that the district court should not have permitted the testimony. Since the defense did not object to Martin's testimony, our inquiry is whether there was plain error which affected substantial rights. Fed. R. Evid. 103(d).

We have previously held that "where the defense plans to impeach witnesses by establishing that their testimony is pursuant to a plea agreement, the government

may introduce this evidence in its case in chief." United States v. Whitehead, 618, F.2d 523, 529 (4th Cir. 1980) (government witnesses permitted to testify on direct examination that they pleaded guilty to the charges at issue in the case). In addition, although the district judge gave no instruction at the time of the testimony, he later charged the jury that an accomplice's guilty plea "is not in and of itself evidence of the guilt of any other person."[5] Finally, the defense counsel made reference to Martin's guilty plea in his opening statement. Cf. United States v. McEachern, 675 F.2d 618, 624 (4th Cir. 1982) ("It ill-becomes defense counsel, after such reference to the plea agreement, to object to its introduction at

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5 Fortner relies on United States v. Harrell, 436 F.2d 606, 617 (5th Cir. 1970). There, however, the trial court failed to give a cautionary instruction.

trial.") We therefore conclude that the inquiry into the guilty plea on direct examination was not error.[6]

Accordingly, the judgment is affirmed.

AFFIRMED.

6 In any event, any error which might have occurred was harmless. The evidence of the fraud was overwhelming, and the fact of Martin's guilty plea had no bearing on the contested issue, Fortner's state of mind. Moreover, Fortner's reliance on the insanity defense implicity conceded that he had committed the fraud. Cf. Harris v. Ballone, No. 81-6863 (4th Cir. June 10, 1982) ("an insanity acquittee has already been shown beyond a reasonable doubt to have committed at least one dangerous act").